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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

NO. 362

ROBERT W. MATTHEWS, as Trustee in Bankruptcy of BEARD & COMPANY, INC.,
Petitioner,

v.

JAMES TALCOTT, INC.,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Opinions Below

Although there was no formal opinion of the District Court, the Judgment Entry is set forth in the Appendix to Appellant's Brief before the United States Court of Appeals, at page 266. The District Court found for the Respondent, James Talcott, Inc., on all issues. The Judgment Entry was supported by detailed Findings of Fact and Conclusions of Law, set forth at pages 254 to 266 of that Appendix.[1]

[1] For convenience, we also will use "App. I" to refer to the Appendix to Appellant's Brief in the Court of Appeals, "App. II" to refer to the Appendix to Appellee's Brief, and "App. III" to refer to the Appendix to Appellant's Reply Brief.

The opinion of the United States Court of Appeals for the Seventh Circuit is reported in 345 F. 2d 374 (1965). It affirmed the ruling of the District Court.

Jurisdiction

The Petitioner is invoking the jurisdiction of this Court under 28 U.S.C., Sec. 1254(1). As set forth in Rule 19 of the Supreme Court of the United States, "a review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor."

Questions Presented

The questions presented for review involve an interpretation of the Factor's Lien Law of the State of Indiana, and a consideration of factual questions that were decided in favor of the Respondent in the trial court. The questions include the following:

1. Did the Court of Appeals err in affirming the District Court in its Findings and Conclusions that four designations of lumber inventory, subjecting lumber of the bankrupt to the Respondent's factor's lien, made within four months prior to bankruptcy, did not constitute voidable preferences?

2. Did the Court of Appeals err in affirming the District Court in its Findings and Conclusions that letters designating the inventory of wood mouldings, by general description and dollar amounts, were valid and sufficient to subject the bankrupt's inventory of wood mouldings to Respondent's factor's lien?

3. Did the Court of Appeals err in affirming the District Court in its Findings and Conclusions that warehouse

receipts held by the Respondent, covering lumber inventory of the bankrupt deposited in a field warehouse conducted on the bankrupt's premises by an independent warehouse company, gave the Respondent a valid security interest in such lumber?

4. Did the Court of Appeals err in affirming the District Court in its Findings and Conclusions that accounts receivable assigned by the bankrupt to Respondent within ten days prior to bankruptcy grew out of the sale of merchandise covered by Respondent's factor's lien, and the lien was transferred automatically to the proceeds of sale?

5. Did the Court of Appeals err in affirming the District Court in its Findings and Conclusions that the lien of the chattel mortgage held by Respondent covered all tangible items of machinery, equipment, supplies and leasehold improvements of the bankrupt, under the blanket clauses set forth therein?

Statutes Involved

The pertinent provisions of the Bankruptcy Act are Sections 60a(1) and (2) and 60b. 64 Stat. 24 (1950), 11 U.S.C., Sec. 96a(1) and (2); and 52 Stat. 869 (1938), 11 U.S.C., Sec. 96b.

The pertinent provisions of the Indiana Factor's Lien Law are set forth in Indiana Acts 1955, Ch. 167, Sec. 1-4, Sec. 7, pp. 337-341; Burns' Indiana Statutes (1963 Supp.), Sec. 43-1201 to 43-1204, 43-1207. This Act was repealed by Indiana Acts 1963, Ch. 317, Sec. 10-102, adopting the Uniform Commercial Code, which became effective in Indiana on July 1, 1964.

The statutory provisions are set forth at pages 40 to 46 of Petition in Appendix C.

Statement of the Case

The Petition seeks this Court's review of a judgment of the United States Court of Appeals for the Seventh Circuit affirming a judgment of the United States District Court for the Southern District of Indiana, Indianapolis Division, in favor of the Respondent, James Talcott, Inc. The issues arose in a plenary action to set aside alleged voidable preferences, under Sec. 60 of the Bankruptcy Act.

A Creditor's Petition in Involuntary Bankruptcy was filed against Beard & Company, Inc., on September 28, 1962. Adjudication followed on October 15, 1962. Robert W. Matthews was appointed Receiver and subsequently became Trustee. The Bankrupt had been engaged in the manufacture and sale of wood mouldings and the wholesale distribution of lumber.

On October 5, 1960, the Bankrupt had entered into a factoring agreement with the Respondent. From that date until September 26, 1962, the Respondent continuously loaned money to the bankrupt, always on a secured basis. The primary instrument of the transaction provided for an assignment of all of the accounts receivable of the bankrupt to Respondent. In return, Respondent agreed to advance a sum up to 85% of the net amount of the receivables. (App. I, 13).

The first supplement gave Respondent a factor's lien on:

> "all goods and merchandise from time to time designated, consigned to or pledged with you by the undersigned (Beard & Company, Inc.) whether in your constructive, actual or exclusive occupancy or possession or not, and whether or not such goods and merchandise shall be in existence at the date hereof or shall come into existence subsequently thereto, or

shall subsequently thereto be acquired by the undersigned, and upon any accounts receivable or other proceeds resulting from the sale or other disposition of such goods and merchandise." (App. I, 21).

Notice of this lien was filed by Respondent on October 5, 1960, in the office of the Recorder of Marion County, Indiana, pursuant to the provisions of the Indiana Factor's Lien Act, Indiana Acts 1955, Ch. 167; Burns' Indiana Statutes (1963 Supp.), Sec. 43-1202.

The second supplement provided that the Defendant would also be secured by a pledge of goods and mechandise deposited in a field warehouse, under an agreement between the Bankrupt and a professional warehouseman, pursuant to which non-negotiable warehouse receipts for such goods and merchandise were to be issued by the warehouseman to the Defendant. (App. I, 25).

The Respondent advanced specific sums to the bankrupt on the security of warehouse receipts. It also made a chattel mortgage loan on machinery, equipment, fixtures and other personal property of the bankrupt. All security agreements were in writing, and all instruments were properly filed and recorded in accordance with the requirements of Indiana law (Findings of Fact, 9, 31; App. I, 256, 263).

By mid-September, 1962, the bankrupt had outstanding loans from the Respondent in excess of $500,000.00. The Respondent received word, on September 25, 1962, that the bankrupt had issued credit memoranda in the approximate sum of $200,000.00 against various assigned accounts receivable (App. I, 64). An immediate investigation disclosed that certain of the assigned accounts had been fictitious. Pursuant to the provisions of the security agreement, the Respondent took physical possession of all merchandise

covered by its factor's lien agreement on September 27, 1962. The bankruptcy proceedings then ensued on September 28. At the time of the bankruptcy, the bankrupt owed the Respondent $512,785.46. (App. I, 34).

By agreement between the Receiver and the Respondent, approved by the District Court, the physical assets were sold by the Receiver and Trustee. The net proceeds were turned over to the Respondent under an agreement that if the Trustee questioned the validity of the secured obligations claimed by Respondent, a plenary action could be filed in the United States District Court for the Southern District of Indiana.

Such an action was filed by the Trustee. It raised five (5) separate issues:

1. It alleged a preference in favor of the Respondent arising from four (4) designations of lumber inventory under the Factor's Lien Law of the State of Indiana, within the four (4) months prior to bankruptcy. Of the $25,607.70 realized from the liquidation of such lumber in the bankruptcy proceedings, the sum of $14,688.57 represented the net proceeds from the sale of lumber which had been subjected to the factor's lien by designations executed within four (4) months of the date of bankruptcy. The Trustee sought to recover this sum as a voidable preference. The Respondent admitted that the four (4) designations subjecting lumber inventory to the factor's lien were made during the four (4) months prior to bankruptcy. But, Respondent alleged that the designations of lumber inventory were made pursuant to the Factor's Lien Law of the State of Indiana, and that the lien in each instance related back to October 5, 1960, the date on which the notice of factor's lien was filed in accordance with the Indiana statute.

In addition, it was alleged (and the District Court held) that the Respondent had no reasonable cause to believe that the bankrupt was insolvent at any time prior to September 25, 1962 (App. I, 264). This in itself ruled out any possible voidable preference on the first three questioned designations of lumber inventory made in June, July and August, 1962. The Court of Appeals did not disturb this finding of the District Court. Thus, the only designation of lumber inventory after Respondent had reasonable cause to believe that Beard & Company, Inc. was insolvent, occurred on September 27, 1962. The proceeds of factor's lien lumber allocable to that designation were in the sum of $4,278.03.[2]

Finally, Respondent alleged (and the District Court and the Court of Appeals held) that Respondent made loans to the bankrupt from June 6, 1962, through September 26, 1962 (App. I, 264) representing money advanced in the sum of $591,264.63 (App. II, 43-45). The factor's lien was to provide for security for all moneys loaned, under its cross-

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[2] Plaintiff's Exhibits NN and OO, filed as part of the Record in this cause, give a detailed analysis of lumber inventory. Exhibit NN shows what portions of the lumber physically on hand at the start of bankruptcy were covered by warehouse receipts, and what portions were attributable to the factor's lien. Exhibit OO shows what portions of the lumber covered by the factor's lien were attributable to each specific designation of inventory.

Plaintiff's Exhibit R, filed as part of the Record, was an appraisal of lumber and mouldings. It showed certain proportional values which were applied in Plaintiff's Exhibit TT, set forth in App. I at page 226. These methods of allocation led Petitioner to contend, at page 27 of his Brief before the Court of Appeals, that the moneys turned over to Talcott from the proceeds of factor's lien inventory should be attributed to the following designations:

September 27, 1962	$ 4,278.03
August 28, 1962	$ 8,506.55
July 24, 1962	$ 1,219.24
June 6, 1962	$ 664.75
Designations prior thereto	$10,939.13

collateral provisions (App. I, 21). Therefore, the designations of lumber inventory were part of the security for current advances, and were not transfers on account of an antecedent debt as required by Sec. 60 of the Bankruptcy Act to make the transactions preferential. This gives further force to Finding 36 of the trial court that:

> "While Beard may have been insolvent on the dates of said respective designations, no voidable preference took place." (App. I, 264)

2. The second issue involved the validity of Respondent's factor's lien on the bankrupt's wood mouldings inventory. The Trustee questioned the factor's lien on those items because the designations of mouldings inventory were made by dollar amounts rather than by specifically itemizing the mouldings covered. The bankrupt sent to Respondent, approximately at monthly intervals beginning on October 5, 1960, and continuing to August 6, 1962, twenty-two (22) written designations and schedules of merchandise subject to Respondent's continuing general lien. The written designations referred to "raw materials and work in process, consisting of lumber of varying grades and sizes and wood mouldings" and "finished goods, consisting of wood mouldings" and gave a dollar amount for each category of inventory.

The inventory of mouldings designated in the schedules was physically present at the plant of the Bankrupt in Indianapolis at all of the dates indicated (App. II, 36-37, 40-42). Both the District Court and the Court of Appeals held that under Indiana law, the dollar amount designations and the recorded notice of factor's lien were adequate to subject the wood mouldings of the Bankrupt to the Respondent's factor's lien.

3. The third issue involved the validity of warehouse receipts held by Respondent. These covered lumber inventory of the Bankrupt deposited in a field warehouse conducted on the Bankrupt's premises by Douglas Guardian Warehouse Corporation. There is extensive evidence of the mechanics of the operation of the warehouse. This issue was purely factual and both the District Court and the Court of Appeals held that Douglas Guardian had custody of, and exercised dominion and control over, the lumber inventory covered by the warehouse receipts held by Respondent. This was sufficient to create completely valid warehouse receipts and to protect the lien of the Respondent on the lumber covered by the receipts.

4. The fourth issue involved the validity of the assignments of accounts receivable by the Bankrupt to Respondent during the period between September 19, 1962, and September 28, 1962, the date of bankruptcy. This, too, was a fact question. The facts showed that the accounts receivable assigned during this period grew out of the sale of merchandise covered by Respondent's factor's lien (App. I, 67). Therefore, as Respondent argued (and as the District Court and the Court of Appeals held) under Indiana law, the designation of merchandise subject to a factor's lien, operates automatically as an assignment of the accounts receivable resulting from the sale of such merchandise.

In addition, new money was being advanced to the Bankrupt by Respondent during the time the accounts receivable were assigned. Also, the accounts receivable assigned prior to September 25, 1962, could not be regarded as voidable preferences because there was no showing that Respondent had any reasonable cause to believe that the Bankrupt was insolvent prior to that time.

5. The last issue involved a dispute over whether certain personal property of the Bankrupt not specifically listed in the Respondent's chattel mortgage was subject to the lien of that chattel mortage. The mortgage contained a list of specific machinery and equipment which was identified in the mortgage as being located at 1121 East 33rd Street, Indianapolis, Indiana. The mortgage also contained certain blanket clauses indicating that it covered additional personal property of the Bankrupt which was not specifically described. The District Court and the Court of Appeals held that, under Indiana law, the lien of the chattel mortgage covered all tangible items of machinery, equipment, supplies and leasehold improvements under the blanket clauses set forth therein. The recording of the mortgage was sufficient notice to enable any creditor, by inquiry suggested in the instrument itself, to identify all of the property covered thereunder.

ARGUMENT

Although this case involves five (5) separate questions, the legal issues are extremely narrow and do not warrant review by this Court on certiorari. The decision of the Court below hinges primarily on the approval of the findings of fact by the District Court, and the determination that the Respondent took all steps required by Indiana law to perfect and protect the lien of its various security devices. The conflicts between the decision of the Court below and the decisions of this Court, which are alleged by the Trustee as the basis for his Petition, simply do not exist.

There is no conflict between the decision of the Court below and the decision of another Court of Appeals on the same matter. There is no conflict between the decision of the Court below and applicable state law in the State of Indiana. There is no basis whatever for Petitioner's allegation that the Court below has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

The findings of fact and conclusions of law of the District Court are amply documented. The District Judge interpreted the Indiana Factor's Lien Law, not previously considered by any Appellate Court of the state, as meaning exactly what it says—that the lien is valid from the time of filing the original notice with the County Recorder, if the statutory requirements are met. The Court of Appeals has affirmed the ruling of the District Court that no voidable preferences resulted.

Moreover, with the undisturbed finding of the District Court that the Respondent had no reasonable cause to believe that Beard was insolvent at any time prior to September 25, 1962 (App. I, p. 264), the dollar amount attributable to the final designation of inventory is relatively small.

The reasons relied on for the allowance of the writ will be met here in the same order they are presented in the Trustee's Petition, pp. 7-20.

1. The Respondent's Factor's Lien on the Lumber Inventory.

On October 5, 1960, Beard & Company, Inc. entered into a written factoring agreement with the Respondent. On that same day, pursuant to Indiana law, notice of this arrangement was filed with the Recorder of Marion County, Indiana. The notice identified the general character of merchandise and accounts receivable subject to the lien or which might become subject to the lien as follows:

> "All raw materials, including, but not by way of limitation, lumber of varying sizes and grades; all work in process and all finished goods, including, but not by way of limitation, wood mouldings, together with all accounts receivable resulting from the sale of the foregoing finished products and goods."

Between October 13, 1960, and September 27, 1962, the Bankrupt delivered to the Respondent twenty-five (25) separate designations of lumber inventory. Each described the lumber thereby designated. The Trustee attacked the last four (4) designations made within four (4) months prior to bankruptcy as voidable preferences. The District Court and the Court of Appeals denied this contention.

A. The Decision of the Court Below is Clearly Correct.

The Court below, after carefully reviewing the extensive findings of fact of the Trial Court, correctly held that the four (4) questioned designations were not made for or on account of an antecedent debt as required by Sec. 60 of the Bankruptcy Act. The four (4) questioned designations were security for loans made within the four-month period prior to bankruptcy.

From June 6, 1962, through September 26, 1962, the Respondent advanced the Bankrupt the sum of $591,264.63 on the security of what it thought were valid accounts receivable. The undisputed evidence, however, is that over $200,000.00 of the accounts receivable were fictitious (App. I, 155-158). Thus, the Bankrupt was inducing the Respondent to loan on non-existent security.

Under standard practice in accounts receivable financing, which was followed by the Respondent in this case, money was loaned against all accounts receivable which appeared at any one time to be eligible, i.e., not over ninety (90) days old. Yet, the Respondent was actually lending more than the valid accounts receivable would justify. Therefore, the Respondent was entitled to look to the factor's lien as collateral, and it was actually advancing new money at the time the designations of lumber inventory were made in June, July and August of 1962. The conclusion of the Court below to this effect was well-founded on the findings of fact of the Trial Court.

It is not the function of this Court to review decisions based upon factual determinations.

> "A court of law, such as this court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and

exceptional showing of error." *Graver Tank and Manufacturing Co. v. Linde Air Products Company*, 336 U. S. 271, 275, 93 L. Ed. 672, 677, 69 S. Ct. 535, 538 (1949).

No such showing is made in this case.

B. There is No Conflict of Decisions.

Petitioner asserts that the decision in this case is contrary to the decision of this Court in *McKenzie v. Irving Trust Company*, 323 U. S. 365, 89 L. Ed. 305, 65 S. Ct. 405 (1945). The Court below impliedly affirmed the holding of the District Court that the four (4) designations of lumber inventory made within the four-month period prior to bankruptcy, did not constitute voidable preferences under Sec. 60(a) of the Bankruptcy Act because the designations related back to October 5, 1960, when the notice of factor's lien was filed by the Respondent. The Indiana Factor's Lien Act gave a continuing lien upon the merchandise of the borrower as designated in separate written statements, and upon accounts receivable resulting from the sale or disposition of such designated merchandise. *The Lien was valid from the date of filing the notice and was a continuing lien, even though the merchandise came into existence at a later date.* Indiana Acts 1955, Ch. 167, Sec. 2, Burns' Ind. Stat. (1963 Supp.) Sec. 43-1202, provided:

> "Lien-Written agreement necessary—Continuing lien —Essentials of notice.—If so provided by any written agreement with the borrower, a factor shall have a continuing lien upon such merchandise of the borrower as is from time to time after the execution of said written agreement designated in one (1) or more separate written statements dated and signed by the borrower and delivered to the factor, and upon any accounts receivable or other proceeds resulting from the sale or other disposition of any such merchandise,

without such merchandise being taken into the constructive or actual possession or custody of the factor or of a third person for the account of the factor, and such lien shall secure the factor for all his loans and advances to or for the account of the borrower, together with interest thereon, and also for the commissions, obligations, indebtedness, charges, and expenses properly chargeable against or due from said borrower, and for the amounts due or owing upon any notes or other obligations given to or received by the factor for or upon account of any such loans or advances, interest, commissions, obligations, indebtedness, charges, and expenses. *Such lien shall be valid from the time of filing the notice hereinafter referred to, whether such merchandise shall be in existence at the time of the execution of the written agreement providing for the creation of the lien or at the time of filing such notice or shall come into existence subsequently thereto or shall subsequently thereto be acquired by the borrower.*" (emphasis added).

This Court has clearly held that State law determines when a transfer is perfected for the purposes of Sec. 60(a) of the Bankruptcy Act. In *McKenzie v. Irving Trust Company*, 323 U. S. 365, 89 L. Ed. 305, 65 S. Ct. 405 (1945), this Court said:

"In the absence of any controlling federal statute, a creditor or bona fide purchaser could acquire rights in the property transferred by the debtor, only by virtue of a state law. And hence Sec. 60(a)'s 'apparent command is to test the effectiveness of a transfer, as against the trustee, by the standards which applicable state law would enforce against a good faith purchaser.' *Corn Exch. Nat. Bank & T. Co. v. Klauder*, 318 U. S. 434, 436, 437, 87 L. Ed. 884, 886, 887, 63 S. Ct. 679, 114 A.L.R. 1189, 52 Am. Bankr. Rep. (N. S.) 596. See also *Benedict v. Ratner*, 268 U. S. 353, 359, 69 L. Ed. 991, 997, 45 S. Ct. 566, 6 Am. Bankr. Rep. (N. S.) 9, and cases cited. *Section 60(a) in this re-*

spect, as do numerous other federal statutes, see *Davies Warehouse Co. v. Bowles,* 321 U. S. 144, 155, 156, and note 20, 88 L. Ed. 635, 643, 644, 64 S. Ct. 474, and cases cited, *thus adopts state law as the rule of decision. The state standards which control the effectiveness of a transfer likewise determine the precise time when a transfer is deemed to have been made or perfected.*" (Emphasis added).

There is no conflict between the decision of the Court below and the decision of this Court in the *McKenzie* case. The Court below and the District Court both following *McKenzie,* held that the Indiana law relating the factor's lien back to the date of the filing of the notice means exactly what it says, and is just as effective against a Trustee in Bankruptcy as it is against any of the other lien creditors anticipated by the law itself.

The decision of the Court below is squarely in accord with the only other Circuit Court of Appeals decision on this point. The case of *Mattes v. American Acceptance Corporation,* 204 F. Supp. 26 (D.C. M.D. Pa. 1961), *aff'd* 301 F. 2d 908 (3rd Cir. 1962) also applies the ruling of *McKenzie v. Irving Trust Company* to an alleged preference arising under a factor's lien agreement. There, the District Court had said in 204 F. Supp. at 26-27:

> "Under applicable state law, which determines when a transfer is perfected for purposes of Sec. 60 sub. a of the Bankruptcy Act, see *McKenzie v. Irving Trust Co.,* 1945, 323 U. S. 365, 369-370, 65 S. Ct. 405, 89 L. Ed. 305, defendant acquired a continuing general lien effective against subsequent lien creditors from the time of recording, on all merchandise described in the lien agreement and in separate written statements, and on the proceeds resulting from the sale of such merchandise, i.e., the accounts receivable, whether in existence at the time of execution of the agreement or subsequently acquired by the bankrupt. See Maryland

> Factors Lien Act, June 1, 1945, L. 1945, Chap. 1019, Art. 2, Secs. 21-27, Ann. Code of Maryland, as amended April 27, 1951, L. 1951, Chap. 583; Pennsylvania Factors Lien Act, June 10, 1947, P. L. 529, Secs. 1-10, as amended April 1, 1949, P. L. 391, 6 P. S. Secs. 221-229. *In accordance with Sec. 60 sub. a (2) the transfer and assignments are deemed to have been perfected at the time American's lien became effective against subsequent lien creditors, i.e., upon recording, prior to the four-month period, and are therefore not preferential under Sec. 60 sub. a (1).* See 3 Collier, Bankruptcy (14th Ed. 1956), Par. 60.39, p. 912; Id. Par. 60.48, pp. 966, 967; and see legislative history in re amendment to Sec. 60, Vol. 2, 1950 U. S. Code Congressional Service, p. 1985, et seq." (Emphasis added).

The decision of the District Court was affirmed per curiam by the Third Circuit Court of Appeals in 301 F. 2d 908 (3rd Cir. 1962), as follows:

> "Upon review of the record, we find no error.
> "The judgment of the district court will be affirmed on the well-reasoned opinion of Chief Judge Murphy, 204 F. Supp. 26."

While the facts in the *Mattes* case are not clearly set forth in the reported opinion, the statement of law quoted above is directly in accord with the rulings of the District Court and the Court of Appeals in the instant case. An examination of the Record and Briefs in the *Mattes* case in the United States Court of Appeals for the Third Circuit shows that the issue appealed involved the validity of certain assignments of accounts receivable made within four (4) months prior to bankruptcy. The assignments grew out of a factor's lien agreement which had been perfected two years and ten months prior to bankruptcy. The Court of Appeals affirmed on the language of the District

Court decision, that the assignments were effective against subsequent lien creditors from the time of the original recording of the factor's lien prior to the four-month period, even though the assignments themselves were executed within the four (4) months prior to bankruptcy.

There is no conflict between the decision of the Court below and the decision of the Sixth Circuit Court of Appeals in the case of *In Re Summit Hardware, Inc.* 302 F. 2d 397 (6th Cir. 1962), cert. dismissed sub nom. *Foote v. Schwemler,* 371 U. S. 882, 9 L. Ed. 2d 118, 83 S. Ct. 154 (1962). The facts of the *Summit Hardware* case are completely different from the facts of the present litigation. In the *Summit Hardware* case, *no* designations of inventory to be covered under the factor's lien were ever made by the borrower. The borrower and the factor entered into a factor's lien agreement and a notice of factor's lien was properly recorded. But, they made no further effort to comply with the Ohio Factor's Lien Statute, which is similar to the Indiana Factor's Lien Statute, in its requirement that separate written designations be delivered by the borrower to the factor in order to subject inventory to the factor's lien.

The case now before the Court differs from the *Summit Hardware* case, because the Respondent did receive regular designations of lumber inventory from the Bankrupt and the only question is whether the lien referred to in those designations was effective from the time of filing the notice on October 5, 1960.

C. The Interpretation and Application of the State Law Should not be Reviewed by this Court.

We respectfully submit that the Court below was correct in its holding that the lien on inventory designated

within four (4) months prior to bankruptcy relates back to October 5, 1960, under the Indiana law which governs the situation. The precise issue of state law involved is one which has not been decided by the Indiana Courts. However, both the District Court and the Court of Appeals faced the question and held that the effective date of the lien was the date of the filing of notice and that all designations made after that time did relate back to the date of filing the notice as provided by the Indiana statute.

This Court has consistently held that it will not interfere with the interpretation of local law by local courts. *United States v. Durham Lumber Company,* 363 U. S. 522, 526, 4 L. Ed. 2d 1371, 1374, 80 S. Ct. 1282, 1284-1285 (1960). There this Court said:

> "It is suggested that the courts of North Carolina have never specifically described the nature of the property rights created by the North Carolina statutes involved in this case, and that the Court of Appeals' interpretation of those statutes is probably incorrect. However, where '(t)he precise issue of state law involved . . . is one which has not been decided by the . . . (state) courts,' this Court has said that '(i)n dealing with issues of state law that enter into judgments of federal courts, we are hesitant to overrule decisions by federal courts skilled in the law of particular states unless their conclusions are shown to be unreasonable.' *Propper v. Clark,* 337 U. S. 472, 486, 487, 93 L. Ed. 1480, 1492, 1493, 69 S. Ct. 1333. Since the Court of Appeals is much closer to North Carolina law than we are, and since we cannot say that the court's characterization of the taxpayers' property interests under that law is clearly erroneous or unreasonable, the judgment is Affirmed."

The interpretation of Indiana law by the Court below is neither clearly erroneous nor unreasonable.

D. The Question of the Interpretation and Application of the Indiana Factor's Lien Law is now Moot because that Law was Repealed as of July 1, 1964.

Finally, the Petitioner urges the review of this problem because an analogous situation is allegedly presented by the Uniform Commercial Code. This point is raised because the Indiana Factor's Lien Act which was in effect at the time this case arose was repealed by the enactment of the Uniform Commercial Code which took effect in Indiana on July 1st, 1964. Suffice it to say that the problems under the two statutes are not analogous and that if there is a problem in this area raised by the provisions of the Uniform Commercial Code, that problem should be resolved in a case arising under the Code, not this one which arose under the now obsolete Indiana Factor's Lien Act.

This Court should not review an issue now moot because of the pertinent statute's repeal. Cf. *District of Columbia v. Sweeney,* 310 U. S. 631, 84 L. Ed. 1402, 60 S. Ct. 1082 (1940), where certiorari was denied "in view of the fact that the tax is laid under a statute which has now been repealed and the question is therefore not of public importance."

2. The Designations of Wood Mouldings.

The crux of the decision of the Court below regarding the designations of wood mouldings is its conclusion that the designations by way of letters sent by the Bankrupt to the Respondent and identifying the wood mouldings only by a dollar amount were sufficient to subject the mouldings to the Respondent's factor's lien. The Court concluded that under Indiana law the fact that it would have been necessary to use parole evidence to identify the specific property secured by the lien did not affect the validity

of the designations or of the lien. The Petitioner has shown no conflict between this conclusion and any Indiana law.

But, the Petitioner claims that the approval of letter designations of mouldings by dollar amounts is in conflict with the decision of the Sixth Circuit Court of Appeals in the case of *In Re Summit Hardware, Inc.*, 202 F. 2d 396 (6th Cir. 1962), cert. dismissed sub nom. *Foote v. Schwemler*, 371 U. S. 882, 9 L. Ed. 2d 118, 83 S. Ct. 154 (1962). Again we submit that there is no conflict with the *Summit Hardware* case because the facts of that case were entirely different. In that case, *no* designations of any sort were ever made.

Even if a conflict between the decision of the Court below and that of the *Summit Hardware* case could be gleaned, the issue would still not be one for this Court. The problem is one of the interpretation of state law and this Court has held that conflicts among circuits as to questions controlled by state law are not of themselves reasons for granting writs of certiorari. *Ruhlin v. New York Life Insurance Company*, 304 U. S. 202, 206, 82 L. Ed. 1290, 1292-1293, 58 S. Ct. 860, 861 (1937). There this Court said:

> "As to questions controlled by state law, however, conflict among circuits is not of itself a reason for granting a writ of certiorari. The conflict may be merely corollary to a permissible difference of opinion in the state courts. The rules indicate that the court will be persuaded to grant certiorari where a circuit court of appeals 'has decided an important question of local law in a way probably in conflict with applicable local decisions.' No such showing was attempted by the petition. Nor was it contended that the decision below was 'probably untenable' and therefore probably in conflict with the state law as yet unannounced by the highest court of the state.

> "No decision at the present time could reconcile any 'conflict of circuits', or do more than enunciate a tentative rule to guide particular federal courts. Therefore, even assuming that it is adequately presented on the record, we decline to decide the issue of state law."

Once the validity of the dollar amount designations of mouldings is established, the burden of showing that the mouldings inventory sold by the Petitioner was *not* covered by the Respondent's lien was on the Petitioner. The Petitioner maintains that since no designations of mouldings inventory were made after July 31, 1962, it was necessary for the Respondent to prove that it still had a valid factor's lien on the mouldings inventory as it existed at the date of bankruptcy, September 28, 1962. The decision of the Court below that the burden of proof on this point was on the Petitioner is well-founded and not in conflict with any of the decisions of this Court.

The Respondent took possession of all of the merchandise at the Bankrupt's plant which had been previously under the Respondent's factor's lien, on September 27, 1962 (Finding of Fact 34, App. I, p. 264). All of the mouldings inventory which was in the possession of the Respondent prior to the bankruptcy was turned over to the Petitioner for sale by him pursuant to an agreement between the Petitioner and the Respondent (Plaintiff's Exhibit "F" App. III, 1). The Petitioner admits that the agreement expressly provided that the rights of the parties should not be deemed altered and that the execution of the agreement should not be deemed an acknowledgment by the Petitioner of the alleged liens or possession of the Respondent. The Petitioner fails to mention, however, that the agreement also provided:

> "The execution of this agreement by Talcott and the operation pursuant to the terms hereof by Talcott and Douglas Guardian Warehouse Corporation shall in no way be deemed a waiver of any of the alleged security interests or alleged right to possession of the inventories by Talcott . . . "

The Petitioner then argues that had this agreement not been executed, the Respondent would have had to enforce its alleged factor's lien on the mouldings inventory in the Bankruptcy Court, and in such a proceeding it would have been required to identify positively the mouldings subject to its factor's lien. *This is not the case.* Had the agreement not been executed, the Respondent would have retained possession of the mouldings inventory which it acquired prior to bankruptcy, and a plenary action would have had to have been brought by the Trustee to question the Respondent's rights to the mouldings inventory. In any such action the Petitioner would have had the burden of proof.

When the Petitioner alleged in his Complaint that:

> "The bankrupt's inventory of mouldings . . . was never subjected to the defendant's factor's lien by proper written designations,"

he had the burden of proof to sustain his allegation. It is a basic rule of evidence that when a negative is averred in a pleading, or Petitioner's case depends upon the establishment of a negative, and the means of proving the facts are equally within the control of each party, the burden of proof is upon the party averring the negative. There is no conflict between the decision of the Court below to this effect and the decisions of this Court. *United States v. Denver & R.G.R. Company,* 191 U. S. 84, 48 L. Ed. 106, 24 S. Ct. 33 (1903).

The Petitioner had within his control all facts and records which would have shown whether additional mouldings were received at the Bankrupt's plant in August and September, 1962. If substantial quantities of additional mouldings had been shipped in, it was Petitioner's burden to present that evidence.

From the facts and the records, it is a reasonable inference that the designation of mouldings inventory on August 6, 1962, as of July 31, 1962, covered inventory that was physically present at the date of bankruptcy and was sold by the Petitioner subject to the Respondent's factor's lien. Defendant's Exhibit 53 shows mouldings inventory as of July 31, 1962 in the sum of $126,297.18. Plaintiff's Exhibit "D", the Receiver's Initial Report to the Court, shows mouldings inventory as of September 28, 1962 in the sum of $83,254.56. The difference of $43,042.62 could readily be accounted for by sales between those dates.

3. **Warehouse Receipts.**

The issue of the validity of the warehouse receipts held by the Respondent is purely a factual question involving the mechanics of the operation of a field warehouse by Douglas Guardian Warehouse Corporation. The Court below reviewed the evidence and the extensive findings of the Trial Court. It then concluded that the evidence supported the Trial Court's finding that:

> "at all times from October 5th, 1960, down to and including September 28th, 1962, Douglas Guardian had custody of and exercised dominion and control over the lumber inventory covered by warehouse receipts." (App. I, 263, Finding of Fact 30).

Therefore, the lien of the Respondent's warehouse receipts is completely valid.

There is no legal issue to be decided by this Court. There are no conflicts with Indiana law. Even a cursory review of the decision of this Court in the case of *Union Trust Company v. Wilson*, 198 U. S. 530, 49 L. Ed. 1154, 25 S. Ct. 766 (1905) shows that the Petitioner's argument that the decision below is in conflict with that case, has no merit.

Even if the field warehouse were improperly operated by Douglas Guardian Warehouse Corporation (and there is no evidence of this), the Respondent had no knowledge or notice thereof. This issue was raised before the Trial Court, and that Court held that even under such circumstances the Respondent's rights to the lumber covered by warehouse receipts would be unimpaired (Trial Court Conclusion of Law 8, App. I, 265). The Court below did not disturb this finding.

Thus, the particular problem of the warehouse receipts raised by Petitioner should not be reviewed by this Court for the additional reason that the warehouse receipts would still be valid because the Respondent knew of no discrepancies. There is no point in reviewing a decision which can be sustained on an alternative ground.

4. **Assignment of Accounts Receivable.**

The Petitioner has alleged that certain assignments of accounts receivable from the Bankrupt to the Respondent were preferential. The Trial Court and the Court of Appeals below held that these assignments grew automatically out of the sale of merchandise covered by the factor's lien of the Defendant. Under Indiana law, the factor's lien then followed the accounts receivable.

The only issue here is whether the assigned accounts receivable did grow out of merchandise covered by the Respondent's factor's lien. Both Courts below found that the

assigned accounts receivable did grow out of the sale of merchandise under the factor's lien. This issue is not one for review by this Court. *United States v. Johnston,* 268 U. S. 220, 227, 69 L. Ed. 925, 926, 45 S. Ct. 496, 497 (1924). There this Court said:

> "We do not grant a certiorari to review evidence and discuss specific facts."

5. **The Chattel Mortgage.**

The net proceeds of all the items covered under Respondent's chattel mortgage amount to $2,488.35. The Petitioner questions the validity of the lien on only a few items having relatively little value. This is strictly a question of the applicability of local law to an isolated set of facts. The decision of the Court below does not conflict with the Indiana Chattel Mortgage Act of 1935, which has now been replaced by the Uniform Commercial Code. Under no circumstances does this decision warrant review by this Court.

Conclusion

For all of the foregoing reasons, it is respectfully submitted that this Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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